Pleasantview Nursing Home, Inc. ***and*** **Textile Processors, Service Trades, Health Care Professional and Technical Employees International, Local No. 1.** Case 8–CA–28519

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On March 20, 1998, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The Charging Party Union filed cross-exceptions and a supporting brief. The Respondent filed an answer brief to the General Counsel's exceptions and the Union's cross-exceptions, and the Union filed an answer brief to the Respondent's exceptions. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions, except as discussed below, and to adopt his recommended Order as modified.[3]

For the reasons set forth in the judge's decision, we agree that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing during the term of its collective-bargaining agreement with the Union to remit employee initiation fees to the Union as required by that agreement,[4] by unilaterally raising the wages of certain unit employees during negotiations for a successor contract, and by implementing its final contract offer in the absence of a valid impasse. For the reasons set forth below, however, we reverse the judge and find that the Respondent also violated Section 8(a)(5) by refusing to negotiate with respect to certain mandatory bargaining subjects and by insisting to impasse that the Union negotiate about a nonmandatory subject of bargaining.

1. The Respondent operates a nursing home and has had a collective-bargaining relationship with the Union since 1984. In April 1996,[5] the parties commenced negotiations for a successor to the contract set to expire in May. They held 12 formal bargaining sessions. At their last meeting, on September 17, the Respondent, asserting that an impasse in negotiations had been reached, announced its intention to implement terms and conditions set forth in its final bargaining proposal. It did so on September 22.

At the outset of negotiations, the Respondent informed the Union that it needed to increase wages substantially in order to retain employees, attract new applicants, and otherwise remain competitive. To finance the increase, the Respondent proposed the elimination of three paid holidays and an end to its contributions to the Union's pension plan.

The subject of union security was also raised early in negotiations. The Respondent opposed having to collect and remit initiation fees until such time as the Union organized another nursing home in the area. The Respondent therefore informed the Union that it would insist upon a contractual open-shop clause unless the Union waived collection of the initiation fees. All previous contracts had union-security provisions.

The Respondent's proposals dealing with initiation fees/open shop, paid holidays, and pension plan contributions were major sources of dispute between the parties throughout the negotiations. With respect to initiation fees/open shop, for example, the Union offered at the July 1 bargaining session to withdraw a proposal for the inclusion of part-time employees in the bargaining unit in exchange for the Respondent's withdrawal of its open shop proposal. The Respondent's negotiator replied, "No trade. You know what it would take to get the open

[1] The Respondent asserts that the Union has violated Sec. 102.46(j) of the Board's Rules and Regulations by combining its answer brief with its brief in support of cross-exceptions. Accordingly, the Respondent moves that the Union's brief be stricken in its entirety. We find it unnecessary to pass on the motion as the Union's brief contains essentially the same arguments set forth in the General Counsel's brief in support of exceptions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the Respondent did not intend to frustrate the bargaining process when it failed to include in its updated negotiating proposals several terms which the parties had agreed to earlier, and he consequently found that the Respondent did not violate Sec. 8(a)(5) in this respect. While we adopt this finding, we do not rely on the judge's characterizations of the omitted terms as "almost trivial."

[3] The judge's recommended Order shall be modified to specify that the Respondent shall make whole unit employees for losses resulting from its unlawful unilateral changes in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Any additional amounts owed to the pension fund shall be resolved at the compliance stage of this proceeding. M*erryweather Optical Co.*, 240 NLRB 1213 (1979). We will also modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001).

[4] In agreeing with the judge that the Respondent unlawfully failed to remit initiation fees, we do not rely on fn. 4 of his decision.

[5] All dates are in 1996 unless otherwise indicated.

shop off the table" (undisputedly meaning its initiation fee waiver proposal). In a similar colloquy, the Union inquired at the July 25 negotiation session whether certain proposals were negotiable. The Respondent's negotiator replied that the holiday and pension "buy back" were "non-negotiable." In the meantime, the Respondent had already unilaterally raised the starting wages for new employees and certain current employees, an action related to the "buy back" issue that the Union did not learn about until late August or September.

As noted above, September 17 was the last negotiating session prior to the Respondent's declaration of impasse. At this meeting, the parties identified four areas of disagreement that precluded a new agreement from being reached. Three of those were the Respondent's proposals on initiation fees/open shop, the elimination of three paid holidays, and the cessation of pension fund contributions.

The judge dismissed complaint allegations that the Respondent bargained in bad faith concerning these three subjects. He found that although the Respondent referred to the paid holiday and pension issues as "non-negotiable," the remark did not signal bad faith when considered in light of the Respondent's overall bargaining conduct, which he viewed as constituting lawful "hard bargaining." As for the initiation fee dispute, the judge noted that because the matter involved a nonmandatory subject of bargaining the Respondent could not lawfully insist to impasse that employees not be charged such fees. He concluded, however, that the Respondent did not violate this maxim and, hence, did not violate the Act because it tied its position on this nonmandatory subject to its position on a mandatory bargaining subject, i.e., retention of union security.

2. We adopt the judge's finding that the Respondent violated Section 8(a)(5) when on July 1 it unilaterally raised the wages of certain unit employees during negotiations for a successor contract. The Respondent argues that, due to a tight labor market, it was unable to attract new recruits so that raising the starting wage rate was a competitive necessity. Contrary to our dissenting colleague, we do not find that the Respondent's unilateral action was lawful under the economic exigency exception of *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995).

The general rule is that when parties are engaged in negotiations for a new agreement an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991). In *Bottom Line*, the Board recognized only two exceptions to that general rule: when a union engages in bargaining delay tactics and "when economic exigencies compel prompt action." Id. at 374. The second exception is at issue here.

The Board has limited the economic considerations which would trigger the *Bottom Line* exception to "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). In *RBE Electronics*, the Board made clear that "[a]bsent a dire financial emergency, economic events such as . . . operation at a competitive disadvantage . . . do not justify unilateral action." Id. at 81, citing *Triple A Fire Protection*, 315 NLRB 409, 414 (1994).

However, in *RBE Electronics*, the Board also found that there may be other economic exigencies that, although not sufficiently compelling to excuse bargaining altogether, should be encompassed within the exigency exception. In those cases, the employer will "satisfy its statutory obligation by providing [the union] with adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to impasse over the particular matter. In such time sensitive circumstances, however, bargaining, to be in good faith, need not be protracted." Id. at 82. See generally *Naperville Ready Mix, Inc.*, 329 NLRB 174, 182–184 (1999).

In defining the less compelling type of economic exigency, the Board in *RBE Electronics* made clear that the exception will be limited only to those exigencies in which time is of the essence and which demand prompt action. The Board will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were "compelled," the employer must also show that the exigency was caused by external events, was beyond its control, or was not reasonably foreseeable. Id.

Applying these principles here, it is clear first that the Respondent's claimed exigency is not the type of "extraordinary event" that justifies unilateral action without bargaining. The question then is whether it is of the less compelling type defined by *RBE Electronics*, i.e., whether the employer would be entitled to take unilateral action if bargaining over the particular matter resulted in impasse. While the Respondent has shown that it needed to raise its starting wage rates in order to attract and retain qualified employees, it has failed to show that "time was of the essence" with respect to its employment situation, and that "prompt action" was "compelled" independent of the overall ongoing bargaining process. Id. at 82. The evidence here simply does not demonstrate the sort of emergency that *RBE Electronics* contemplates.

Even if it did, however, we would not find that the Respondent met its residual duty to bargain in good faith under the circumstances here. The Respondent did not notify the Union that it needed to immediately implement the wage rate proposal on a piecemeal basis. Nor did it seek to bargain over the wage-rate increase as a separate, emergency matter. Good-faith bargaining would have entailed informing the union, in advance, that the Respondent believed that an emergency existed and that it intended to unilaterally implement a proposal to address the situation, if impasse were reached. Last, there is no basis for concluding—indeed, the Respondent does not argue—that impasse had been reached on July 1 over the wage rate changes proposed to respond to the claimed exigency.

3. With respect to the Respondent's insistence on proposals to eliminate three paid holidays and its pension plan contributions, it is well established that a party to negotiations is privileged to engage in "hard bargaining" on such mandatory subjects and that it is not generally obligated to compromise or accede to the other party's proposals on these matters. Still, "if a party is so adamant concerning its own initial positions on a number of significant mandatory subjects, we may properly find bad faith evinced by its 'take-it-or-leave-it' approach to bargaining." *88 Transit Lines*, 300 NLRB 177, 178 (1990). Viewing the Respondent's proposals in the context of the entire course of bargaining, we find that it took just such an unlawful intractable approach with respect to paid holidays and pension contributions.

First we disagree with the judge that the Respondent was "not completely inflexible" on these two matters. On the contrary, at no time before or after July 25, when the two items were declared "nonnegotiable," did the Respondent ever change its position and agree to open the matter for discussion. In fact, when considered in light of its bargaining position on wage increases, the Respondent had effectively precluded any other possible approach to the issues of paid holidays and pension contributions. The proposed reduction of costs in these two areas was meant to fund the wage increases which the Respondent identified from the outset of negotiations as a "crucial and immediate need." The Respondent calculated that by eliminating three paid holidays and ceasing its contributions to the employees' pension plan the savings would provide for at least a 50-cent-an-hour increase for all unit employees, particularly new hires, and it permitted no exploration through bargaining of other ways to pay for the increase. As the Respondent's negotiator candidly admitted at the hearing, "[W]e just couldn't come up with a different plan to get the fifty cents."

Furthermore, the Respondent did not wait until agreement or impasse was reached in the overall bargaining process before implementing the wage increase. It unilaterally raised the wages of some unit employees on July 1, in violation of Section 8(a)(5). As the judge himself stated, "By unilaterally raising its wage rates in July, Respondent achieved most of what it hoped to achieve in bargaining. Afterwards, it had little reason to compromise with the Union over those issues that the Union deemed important." Indeed, the Respondent's unlawful preemptive action intensified its intractable commitment to reduce paid holidays and pension contributions to fund a wage increase that was already in place.

Considered in this context, therefore, we cannot agree with the judge that the Respondent engaged in lawful hard bargaining. Rather, its strict adherence to these two proposals in the manner described above constituted bad-faith bargaining in violation of Section 8(a)(5).[6]

4. Different legal principles apply to the Respondent's conduct with respect to its proposal conditioning continuance of the contractual union-security clause on the Union's agreement not to require employees to pay initiation fees. The Respondent does not, and legally could not, contest the point that the latter aspect of this proposal—the initiation fee waiver—constitutes a nonmandatory subject of bargaining and that, as a matter of law, a party to negotiations engages in bad-faith bargaining by insisting on a nonmandatory subject of bargaining to the point of impasse. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). The Board has made clear that the amount of fees required to be paid pursuant to a union-security clause is a nonmandatory subject. *Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223, 1225–1227 (1988), enfd. 905 F.2d 476 (D.C. Cir. 1990), cert. denied 498 U.S. 1082 (1991). As the judge's decision adopted by the Board in *North Bay Center* observed, although "union security generally is a mandatory subject . . . that does not open the door to bargaining about all components and aspects of union security." Id. at 1225. This rule is based on the Act's policy of noninterference in internal union affairs. Id. See also *Bricklayers (Daniel J. Titulaer),* 306 NLRB 229, 235 (1992). ("[T]he amount of dues is a permissive, not a mandatory, subject of bargaining, in that it is an internal union affair.")

In contrast to our dissenting colleague, we see no basis for distinguishing *North Bay Center* here. Whether or not the parties have already agreed to union security, the

[6] *Industrial Electric Reels*, 310 NLRB 1069 (1993), cited by the judge, is distinguishable. Unlike the instant case, the "take-it-or-leave-it" statement uttered by an employer negotiator in *Industrial Electric Reels* was unattended by any other unlawful conduct demonstrating an unlawfully intractable bargaining position.

amount of fees to be paid remains a matter to be resolved between the union and the employees, not between the employer and the union. That an employer may claim an economic interest in the matter does not change its essentially internal union character.

Notwithstanding that the Respondent forced this nonmandatory subject of bargaining to impasse, the judge found no violation because the proposal to eliminate initiation fees was linked to a proposal on a mandatory bargaining subject, i.e., continuance of the contractual union-security clause. We disagree.

The two cases relied on by the judge, *Nordstrom, Inc.*, 229 NLRB 601 (1977), and *Good GMC, Inc.*, 267 NLRB 583 (1983), do not support his conclusion. Unlike the instant case, neither *Nordstrom* nor *Good GMC* involved the issue whether a party could bargain to impasse over a proposal conjoining mandatory and nonmandatory subjects of bargaining. Instead, the issue in those cases was whether a party faced with such a proposal could preempt further bargaining and conclude a binding agreement by accepting only the portion of an offer encompassing mandatory subjects of bargaining while rejecting the portion of the offer encompassing nonmandatory subjects. The Board held that the refusal to sign an agreement on this basis was not unlawful and dismissed the complaint in each case. It did not in any way signal that a party's insistence to impasse on acceptance of the nonmandatory portion of a proposal would be lawful. *Nordstrom* and *Good GMC* are therefore both legally and factually inapposite.

We do not suggest that the Respondent's mere proposal to eliminate the initiation fee was per se unlawful. To the contrary, the Respondent was entitled to make the proposal initially, and to link it to continuance of the union-security clause, as part of an overall contract package. This linkage, however, did not privilege the Respondent to continue to insist upon acceptance of the proposal, to the point of impasse, "in the face of a clear and express refusal by the Union to bargain about the [nonmandatory subject]." *Union Carbide Corp.,* 165 NLRB 254, 255 (1967), enfd. sub nom. *Oil Workers Local 3-89 v. NLRB*, 405 F.2d 1111 (D.C. Cir. 1968). See also *Dependable Storage, Inc.*, 328 NLRB 44 (1999) (linking of mandatory and permissive subjects is unlawful where "inclusion of the permissive subject" is "device to circumvent the general rule that one may not insist upon such a provision to impasse"). By doing so, the Respondent violated Section 8(a)(5).[7]

[7] Our findings of additional 8(a)(5) violations further support the judge's conclusions that: (1) the parties had not reached good-faith impasse in bargaining on September 22, when the Respondent determined to implement its final offer, and (2) in the context of unremedied unfair labor practices, the Respondent could not rely on alleged evidence of employee disaffection with the Union in defense of its failure to bargain.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pleasantview Nursing Home, Inc., Parma, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraphs.

"(c) Insisting to impasse upon a matter that does not constitute a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act."

2. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) On request, bargain collectively with the Union as the exclusive collective-bargaining representative of the Respondent's employees in the above-described unit with regard to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody that agreement in a written, signed instrument."

3. Substitute the following as relettered paragraphs 2(c) and (e).

"(c) Make whole all employees for losses sustained as a result of the Respondent's unilateral actions in the manner set forth in this decision.

"(e) Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

4. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN HURTGEN, dissenting in part.

I disagree with my colleagues in the following respects.

First, unlike my colleagues, I would reverse the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally raising certain wage rates on or about July 1, 1996. As fully described by the judge, the parties commenced negotiations for a new contract in April 1996. At negotiating meetings in June 1996, the Respondent informed the Union that it was having great difficulty attracting qualified employees because its starting wage rates were below the labor market rate. With-

out a wage increase for new employees, the Respondent could not be competitive with other local nursing homes and could not attract new employees. Because of this crucial and immediate need, the Respondent, while continuing to negotiate with the Union, raised its starting wage rate and the wage rates of six new employees, effective July 1. In my view, the economic exigencies facing the Respondent privileged its unilateral action. See *RBE Electronics of S.D.,* 320 NLRB 80, 81 (1995) (when parties are engaged in bargaining, an "economic exigency" requiring prompt action will excuse the employer's action). Clearly, a nursing home needs skilled employees. Without such employees, the Respondent (and, perhaps more importantly, the patients) will suffer. Where, as here, an employer acts to assure skilled employees, and is willing to bargain for further increases, I would not condemn that conduct.[1]

I am *not* contending that the Respondent faced a situation that was so dire as to excuse bargaining altogether.[2] Rather, I believe that the Respondent faced a situation where it could not wait until the end of the full bargaining process. That is, "management does need to run its business, and changes in operations toward that end often cannot await the ultimate full-fledged contract bargaining."[3] In the instant case, the Respondent (and its patients) had a present need for skilled employees. It did not want to sacrifice its business needs and the patients' health by awaiting the end of the bargaining process.

My colleagues say that the problem of attracting qualified applicants was reasonably foreseeable. Assuming arguendo that this is so, Respondent's conduct would nonetheless be privileged. Under *RBE Electronics*, the employer must show that "the exigency was caused by external events, was beyond the employer's control, *or* was not reasonably foreseeable." (Emphasis added.) The Respondent has shown, at least, the first two matters.

With respect to the Respondent's bargaining proposals to eliminate three paid holidays and its pension plan contributions, I agree with the judge that the Respondent engaged in "hard bargaining" rather than bad-faith bargaining. As noted above, the Respondent took the position that its starting wage rates had to be increased. It proposed to fund these increases through certain reductions in other benefits. As the judge found, the Respondent was not inflexible on this matter and was not thereby trying to frustrate agreement. Nor did the Respondent refuse to entertain alternative proposals. In these circumstances, the Respondent's "hard bargaining" was lawful bargaining. See *White Cap, Inc.,* 325 NLRB 1166 (1998); *Telescope Casual Furniture*, *Inc.,* 326 NLRB 588 (1998).

My colleagues rely heavily on: (1) the Respondent's statement that these matters were nonnegotiable and (2) the unilateral increase. As to the first matter, I agree with the judge that the case turns on bargaining conduct rather than bargaining rhetoric. As to the latter, for the stated reasons set forth above, I find that the increases were lawful.

Contrary to my colleagues, I would not find that the Respondent insisted to impasse on a nonmandatory subject of bargaining. Unlike the judge, my colleagues conclude that the Respondent unlawfully insisted to impasse that the Union eliminate initiation fees as part of union-security. As set forth by the judge, the Respondent's bargaining position must be viewed in context. The Respondent was legitimately concerned that high initiation fees—typically paid by new employees—would further inhibit its ability to attract and hire competent new employees. Thus, it sought to prevent new employees from being required to pay the Union's initiation fee.

I do not agree that the subject of initiation fees, as part of union security, is a nonmandatory subject of bargaining. Union security is a mandatory subject. The Respondent was willing to agree to union security, but wanted a waiver of initiation fees. Dues would still be required. My colleagues condemn this position. Under their view, an employer can propose that there be no union security at all, but cannot take the lesser position that there be union security with no initiation fee. Thus, in their view, union security is essentially "all or nothing at all." This is contrary to Section 8(d), under which subjects can and must be negotiated. Section 8(d) forbids the Board from forcing parties to take any particular position on a subject. Thus, the Respondent was free to take the position that it would agree to partial union security.

My colleagues say that the amount of initiation fees is an internal matter. I disagree. Where, as here, the fees are a condition of employment (i.e., under a union-security clause), that is hardly an internal union matter.

Service Employees Local 535 (North Bay Center), 287 NLRB 1223 (1988), which my colleagues rely on, is distinguishable. In that case, the parties already had an agreement on union security. The information that was sought was confined to the amount of agency fees. That subject, by itself, was a nonmandatory subject. By contrast, in the instant case, the Respondent sought to bargain on the entire subject of union security. It would

[1] Contrary to my colleagues, the Respondent gave adequate notice to the Union of its need to increase starting wages. At the parties' June 10 negotiating session and again at the June 17 negotiating session, the Respondent informed the Union of its immediate need to raise wages. Thus, the Union had an opportunity to request bargaining.

[2] *RBE Electronics*, supra at 81.

[3] Id.

agree to union security, provided that initiation fees were waived.

Finally, based on the above, I would find that the Respondent was privileged to implement its final offer on September 22. I would not find that the Respondent engaged in any conduct that precluded a finding of lawful impasse as of September 17—the day that the Respondent declared impasse. It is clear that the parties were deadlocked.

The impasse was not tainted. Concededly, I join my colleagues in finding that the Respondent unlawfully refused to collect and remit union initiation fees during the term of the parties' 1993–1996 contract. Nonetheless, there is no causal connection between the Respondent's conduct regarding initiation fees under the 1993–1996 contract and the parties' deadlock in bargaining for a renewal contract. Absent such a nexus, I conclude that the parties reached lawful impasse on September 17. Therefore, the Respondent's implementation of its last offer was lawful.[4]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain collectively in good faith with Textile Processors, Service Trades, Health Care Professional and Technical Employees International, Local No. 1, in the following appropriate unit:

> All nurses aides, orderlies, housekeeping aides, laundry aides, cooks, dietary aides, activity aides, physical therapy aides and the assistant director of activities at our 7377 Ridge Road, Parma, Ohio facility, but excluding volunteers in the activities department, part-time employees working twenty-four hours a week or less, high school students or nursing students from accredited nursing schools working during the summer months, office clerical employees, guards and supervisors, as defined by the Act.

WE WILL NOT insist to impasse upon a matter that does not constitute a mandatory subject of bargaining as defined by the National Labor Relations Act.

WE WILL NOT make unilateral changes in wages, rates of pay, or other terms and conditions of employment during the terms of a collective-bargaining agreement or during negotiations for a collective-bargaining agreement without reaching agreement with the Union about such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit set forth above in regard to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody that agreement in a written, signed instrument.

WE WILL, on request of the Union, rescind any changes in wages, rates of pay, or other terms and conditions of employment which we have unilaterally instituted.

WE WILL make employees whole for any losses sustained by them as a result of our unilateral action.

WE WILL collect and remit to the Union initiation fees which we were required to collect and remit after March 17, 1996, by terms of our 1993–1996 collective-bargaining agreement with the Union.

PLEASANTVIEW NURSING HOME, INC.

Nancy A. Butler, Esq., for the General Counsel.
Maynard A. Buck, Esq. (Benesch, Friedlander, Coplan & Aronoff LLP), of Cleveland, Ohio, for the Respondent.
David Roloff, Esq. (Goldstein & Roloff), of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cleveland, Ohio, on November 18–19, 1997. The charge was filed September 17, 1996,[1] and the complaint was issued April 30, 1997.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all three parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a nursing home at its facility in Parma, Ohio, on the west side of Cleveland. At this location it annually derives gross revenues in excess of $100,000. It also annually purchases and receives goods valued in excess of $50,000 from points located outside the State of Ohio. Respondent admits and I find that it is an employer en-

[4] Having found, for reasons set forth above, that the Respondent acted lawfully in implementing its final offer, I need not decide if the Respondent acted lawfully for the additional reason that the Union had lost its majority support.

[1] All dates are in 1996 unless otherwise indicated.

gaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent Pleasantview violated Section 8(a)(1) and (5) in failing to bargain in good faith with the Union during its April—September 1996 contract negotiations. He also alleges that Pleasantview violated Section 8(a)(1) in otherwise interfering, restraining, and coercing its employees in the exercise of their statutory rights. More specifically, he alleges that Respondent unlawfully increased the wages of some of its employees during contract negotiations, refused to remit employee initiation fees to the Union prior to the expiration of the last collective-bargaining agreement, insisted that the Union bargain on the waiver of these fees in the new contract, refused to bargain over holiday and pension issues, and insisted on changing provisions to which the parties previously agreed. The General Counsel further alleges that Respondent unilaterally implemented its last bargaining offer without reaching a lawful impasse.

The Union has been the authorized bargaining representative of Respondent's nurses aides, orderlies, housekeeping aides, laundry aides, cooks, dietary aides, activity aides, physical therapy aides, and its assistant director of activities, since 1984. Respondent and the Union have entered into four collective-bargaining agreements, for the periods 1985–1987, 1987–1990, 1990–1993, and June 1, 1993—May 31, 1996, respectively. The parties' chief negotiators for the first two contracts were Frank Scalish, secretary-treasurer of the Union and Margaret Kennedy, an attorney with Benesch, Friedlander, Coplan and Aronoff, for the Respondent. Beginning with the 1990 negotiations, Margaret Kennedy assumed an advisory role and Scalish negotiated primarily with David Farkas, Respondent's administrator.

On April 25, Union negotiator Scalish met with Farkas and Respondent's owner, Alex Daskal, to informally commence the 1996 negotiations. Farkas and Daskal told Scalish that they were having trouble attracting new employees. Therefore, respondent wanted to raise its starting wage rate by 65 cents per hour. Pleasantview proposed financing 50 cents of that increase by eliminating three paid holidays (the employee's date of hire anniversary, birthday, and one personal day) and its contributions to the Union's pension fund. Instead of contributing to the pension plan, Respondent proposed offering employees an opportunity to participate in a 401(k) plan. Scalish responded by saying that these issues could be resolved at the bargaining table.

Respondent's representatives also informed Scalish that if he insisted that they collect and remit the Union's initiation fees, Respondent would insist on an open shop in the next contract. Prior contracts had required employees to maintain their membership in the Union in good standing and had required new employees to join the Union within 30 days of being hired.

Article III, section 4 of the parties' June 1,1993—May 31, 1996 collective-bargaining agreement provides:

> The Home shall deduct from the employee's pay each month the Union initiation fees, if not previously paid, and the regular monthly membership dues, assessments and reinstatement fees of those employees who authorize and direct such deductions by the execution and delivery to the Employer of the individual check-off authorization form.

Each of the prior collective-bargaining agreements contained a substantially similar or identical clause. However, in 1985, shortly after the execution of the first collective-bargaining agreement, the Union agreed, at Respondent's request, to waive the collection and remittance of initiation fees until such time as the Union organized another nursing home on the west side of Cleveland. This understanding remained in force until June 1995.

At that time the Union became the authorized bargaining representative of employees at Alpha Health Care, another nursing home in the western Cleveland suburbs. Shortly thereafter the Union asked. Farkas to collect and remit the initiation fees. In November 1995, Respondent remitted to the Union the initiation fees for two employees. However, Farkas was informed by Margaret Kennedy and one of owners of Alpha Health Care, (a partner in Margaret Kennedy's firm) that the Union had not negotiated a collective-bargaining agreement with Alpha. Upon being so informed, Respondent refused to remit any further initiation fees to the Union. Farkas informed the Union that he would only collect and remit initiation fees when another west side nursing home was obligated to do so.

Formal Bargaining Sessions

The first formal bargaining session between the parties occurred on April 26. They agreed that all provisions of a new agreement would be retroactive to June 1, in the event the contract was signed afterwards. The parties met 12 times between this meeting and September 17. During these sessions they reached agreement on a number of provisions. As discussed later, the General Counsel alleges that Respondent's draft proposals towards the end of the negotiations altered many of the previously agreed-upon terms.

Respondent contends that at a bargaining session in June, Farkas reiterated its desire to raise starting wage rates and that Scalish responded somewhat jokingly that if Pleasantview signed the union proposal it could do so. Pleasantview also contends that at the following session Farkas not only brought up the desire to raise starting wage rates but also a desire to raise the wage rates of current employees whose salary was close to the starting rate. Farkas and Assistant Administrator Steven Hargitai testified that Scalish did not respond verbally but gave a nod and/or shrug indicating that he consented or at least had no objection.

The General Counsel and the Charging Party argue that this testimony is not credible and that Scalish had no indication that Respondent intended to raise the wages of any current employees until late August or September, weeks after Respondent had done so. I do not find Respondent's testimony on this issue credible. As the Charging Party points out in its brief, Scalish would have been surrendering much of his negotiating leverage without getting anything in return. Moreover, Scalish's alleged consent is inconsistent with the clear expression in April, as well as 1 week before, that Respondent's desire for a starting wage increase would have to be settled in the context of contract negotiations. There is no contemporaneous notation of Scalish's consent to these wage increases and Respondent's

position statement submitted to the Board in January 1997 is inconsistent with its testimony at trial. At that time Pleasantview contended that the Union did not object to its raising wages but it did not contend that the Union consented to a unilateral wage increase. In summary, while I find that Pleasantview apprised the Union of its desire to raise starting wage rates, I am not persuaded that it apprised the Union of its desire to raise the wages of any existing employees before it did so and I am not persuaded that the Union consented to these wage increases for either new hires or any current employees.

At the July 25 negotiating session Scalish asked Farkas if Respondent's proposal with regard certain issues was "negotiable." These issues were the "buy back" of three holidays and pension contributions to finance a wage increase, and replacing contributions to the Union's health and disability insurance fund with a company-sponsored insurance fund. Farkas replied that the holiday and pension plan "buy back" was not negotiable, but that the disability fund issue was negotiable.

At the August 26 negotiating session the parties discussed what they perceived to be their major differences. Pleasantview reiterated its position that it would agree to a continuation of the union shop only if the Union agreed to waive the collection of initiation fees by Respondent until another west side nursing home had a similar obligation. The parties also discussed Respondent's pension and holiday buy-back proposal, and the Union's belief that agreed-upon language was being changed by Respondent in its subsequent draft proposals. During this meeting Respondent informed the Union that it had raised its wage rate for new hires about 6 weeks earlier. The Union asked Respondent for a comprehensive counteroffer to its proposal at the next session.

On September 6, Pleasantview presented the Union with a comprehensive counterproposal prepared by its attorney, Margaret Kennedy (GC Exh. 10). The General Counsel and Union contend that the language of Respondent's proposals was not consistent with prior agreements, as follows:

1. The preamble to article 6 (Warning notice/grievance and arbitration process) in Respondent's September drafts provided that "[e]ffective upon ratification all warning notices given prior to ratification shall not be counted against the employees, *except those pertaining to grievances currently pending*" (emphasis added). The Union contends that the parties agreed to this provision without the exception set forth in bold type and that disciplinary "points" assessed against employees for absenteeism and tardiness would also be disregarded after ratification. Respondent contends that the language of the proposal is consistent with what it agreed to previously with the exception of its failure to mention points. Farkas testified points were not mentioned in the draft simply due to an oversight. I credit Farkas' testimony that he never agreed to wipe employees' records clean with respect to grievances that the Union intended to pursue after ratification.

2. Article 6, section 1 sets out a warning notice procedure. The Union contends that Respondent's September 6 proposal changes its prior agreement in that it makes the procedure applicable only to non serious violations of the home's rules. Respondent contends that it always insisted on this limitation. I credit Farkas' testimony in this regard.

3. The prior contract provided that all reprimands must be given in private, not in the presence of coworkers. The parties agreed early in 1996 negotiations to add the exception "other than the shop steward." In the prior contract the next paragraph (GC Exh. 2 at 5, par. 1(a)) stated:

> The first warning notice shall be an oral notice given in the presence of a shop steward or, in the absence of the shop steward, another bargaining unit employee and recorded in the employee's personnel file.

Margaret Kennedy changed this in the September 6 draft, without apparently consulting with Farkas or Scalish. Her draft reads "[T]he first warning notice shall be an oral notice given in the presence of a shop steward, if available, and recorded in the employee's file."

4. The General Counsel alleges and Respondent concedes that on June 17, the parties agreed to the following clauses as article VI, section 1, subsections (c)(2):

> (a) The Home agrees that before suspending an individual for disciplinary reasons, there will be a three working day cooling off period to give the Union Steward and/or the Union Representative a chance to discuss the problem with management. It is understood that prior to this period the affected employee will not grieve the situation.
>
> (b) Individuals suspended, pending investigation for alleged violation of patient rights, such as abuse, neglect or misappropriation, if found unsubstantiated, shall be reinstated to their former position with no loss of wages, seniority or fringe benefits. If found substantiated and not serious enough to justify termination, [the individual] shall suffer no loss of seniority or fringe benefits.

Margaret Kennedy's September 6 draft omitted paragraph 2(b) and provided instead that:

> The Home agrees to allow a three (3) day cooling off period before suspending an employee to give the steward or business agent an opportunity to discuss the problem with management, unless the situation involves abuse or any other activity that could jeopardize residents, fellow employees or the Home's property.

Respondent contends this change resulted from miscommunication between Farkas and Kennedy and is not an attempt at reneging on previously agreed-upon language.

5. The Union and General Counsel allege that article 23, section 4 of Kennedy's September 6 draft is also a departure from what the parties had agreed upon. Her draft reads:

> Employees may examine their personnel files once a year within three *working* days of submitting a written request to their *department head.* [Emphasis added.]

Scalish testified that on May 13, the parties agreed that employees would have a right to examine their personnel files within 3 days (not working days) of a request to their supervisor. Further, there was no limitation on the frequency of such examinations. Respondent concedes that its September 6 proposal did not accurately reflect the prior agreement of the par-

ties on this issue. It submits that this occurred in part due to miscommunication between Farkas and Kennedy and in part due to computer problems at Kennedy's firm. In its next draft presented on September 12, Respondent deleted the once a year limitation and reduced 3 working days to 2 working days. It left the requirement that requests be made to department head unchanged, which was different from what it agreed to earlier in the negotiations.

6. During negotiations the parties discussed a number of issues arising from the Family and Medical Leave Act of 1993 (FMLA). Respondent's draft proposals affirmed the fact that it is entitled to require that an employee provide it with medical certification of the need for a leave of absence as well a return to work authorization. Pleasantview's draft stated that if it needed additional information, i.e., second or third opinions, the cost of these examinations would be borne by the nursing home. In its September 12 proposal, it stated "[f]urther, the Home will not ordinarily require an employee [to] travel outside normal commuting distances to obtain such opinions." The General Counsel contends this language is inconsistent with Respondent's prior agreement to a provision which would allow an employee to select the occupational health facility nearest his or her home for a third opinion. I am not persuaded that Pleasantview agreed to such a provision.[2]

The last two negotiating sessions were held on September 12 and 17. Margaret Kennedy and the Union's attorney, David Roloff attended. Additionally, a Federal mediator was present at both sessions. On September 12, discussions centered on the union security issue, health insurance and the pension/holiday buy back. Scalish complained about Respondent's language regarding the FMLA in that it did not allow an employee to select the location of the third medical opinion and may have mentioned other drafting changes by Respondent.

7. The 1993–1996 contract in article VI, section 4 provided, "Disputes involving wage rate and/or fringe benefit payments shall be considered continuing violations for purposes of the time limitations of this Article. Further, the time limitations provided for in this article may be extended by agreement of the Home and the Union." The parties agreed to move this language early in its 1996 negotiations. The language was moved to a section other than that agreed upon, by Farkas initially and by Margaret Kennedy in her September draft proposals. The General Counsel and Union have not articulated how this change has any substantive importance and I am unable to determine that has any significance.

8. Respondent agreed to specifically include bed makers in part A of its wage schedule in the appendix of the agreement and physical therapy aides and restorative aides in part B of the wage schedule. It did not specifically mention these employees in its September draft proposals and contends that their omission was an oversight.

[2] The General Counsel and the Union also allege that Respondent reneged on a proposal to give a 90-cent pay raise to employees hired after June 1, 1996. I find that Respondent never agreed to give such employees more than a 70-cent raise, although its September 12 proposal appears to do so. I find that the 90-cent raise was an inadvertent drafting error.

On September 17, Respondent suggested that it might agree to the increased contribution to the union disability plan if it could commence its contributions after an employee had been with the home for 6 months. This was rejected by the Union. At the end of this session Pleasantview announced its intention to implement it final offer on September 22 and the Union announced it intention to strike.

On September 22, Respondent in fact implemented its last proposal. The Union's strike lasted one shift. Most of the employees crossed the Union's picket line, which included approximately three Pleasantview employees and several union officials. On or about September 22, Pleasantview obtained letters from about two thirds of its employees stating that they wished to withdraw from the Union. The record does not show the circumstances under which these letters were obtained.

Respondent Violated Section 8(A)(1) and (5) in Unilaterally Raising the Wage Rate for New Hires and Some Current Employees During Contract Negotiations

Respondent concedes that it raised wage rates for new and some current employees in July while contract negotiations were ongoing. It argues that these raises were not unfair labor practices because the Union consented to these raises or, alternatively that the Union waived its right to bargain (R. Br. at 29 fn. 19).

I have found that the Union did not consent to the increases and was not notified in advance that Respondent was going to raise the wages of any current employees. Further, Pleasantview's reliance on the Board's decision in *Clarkwood Corp.,* 233 NLRB 1172 (1977), for the proposition that the Union waived its bargaining rights on this issue is misplaced. When parties are engaged in negotiations for a collective-bargaining agreement, their obligations are somewhat different than they are at other times. There is no need for a party to make additional requests for bargaining on proposals made during contract negotiations. During negotiations, a union must clearly intend, express, and manifest a conscious relinquishment of its right to bargain before it will be deemed to have waived its bargaining rights. Absent such manifestation by the union, an employer must not only give notice and an opportunity to bargain, but also must refrain from implementation unless and until impasse is reached on negotiations as a whole, *Intermountain Rural Electric Assn.,* 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993). I therefore conclude that Respondent violated Section 8(a)(1) and (5) by unilaterally increasing wage rates when no bargaining impasse existed. *Winn-Dixie Stores,* 243 NLRB 972 (1979), *Bottom Line Enterprises,* 302 NLRB 373 (1991).

Respondent Violated Section 8(A)(1) and (5) in Refusing to Remit Employee Initiation Fees to the Union Between March 17 and May 31, 1996

An employer's duty to bargain includes a duty to check off and remit union dues and initiation fees if there is a contractual obligation for doing so. *Cherry Hill Textiles,* 309 NLRB 268 (1992). Article III, section 4 of the parties' June 1, 1993—May 31, 1996 collective-bargaining agreement contains such an obligation. However, it is uncontroverted that in 1985, the parties agreed orally that Respondent need not comply with this provision until a second westside nursing home was organized (ac-

cording to the Union), or until another home was obligated to collect and remit initiation fees (according to Respondent).[3] This understanding remained in force until mid-1995.

I conclude that the intention of the parties with regard to their oral agreement is irrelevant to the resolution of the unfair labor practice. The Board refuses to consider oral agreements which would invalidate or vary the language of a written collective-bargaining agreement. *Beech & Rich, Inc.,* 300 NLRB 882 (1990); *NDK Corp.,* 278 NLRB 1035 (1986); *Executive Cleaning Services,* 315 NLRB 227, 228 (1994); *E. I. Du Pont & Co.,* 294 NLRB 563 (1989), and *Martinsville Nylon Employees v. NLRB,* 969 F.2d 1263, 1267–1268 (D.C. Cir. 1992). On the other hand, the Board has stated that it will consider an oral modification to a written collective-bargaining agreement when the agreement does not require such modifications to be in writing. *St. Vincent Hospital,* 320 NLRB 42 (1995). However, in the instant case, the 1993–1996 collective-bargaining agreement in article 26 states that no amendment or revision of any of the terms or conditions contained in the agreement shall be binding unless executed in writing by the parties. It further states that the waiver of any breach or condition of the agreement shall not constitute a precedent in the future enforcement of all the terms and conditions of the agreement. In view of the article 26 language, Respondent is bound by the clear and unambiguous written terms of the agreement. Therefore, it violated Section 8(a)(1) and (5) in failing to comply with those terms.[4]

Respondent Did Not Violate the Act in Insisting During Contract Negotiations on Relief from the Obligation to Collect and Remit Union Initiation Fees as a Price for a Union Shop

The General Counsel and the Union correctly contend that Union dues and initiation fees are not mandatory subjects of bargaining. However, an employer is not required to accede to a union's proposal that it collect and remit initiation fees and it may bargain concerning such a proposal. See *Tritac Corp.,* 286 NLRB 522, 523 (1987); *American Thread Co.,* 274 NLRB 1112 (1985). It may not insist on resolution of a nonmandatory subject in its favor as a prerequisite of an agreement, *NLRB v. Borg-Warner Corp.,* 356 US 342 (1958).

An employer may, however, tie its position on a mandatory issue of bargaining, such as union security (open shop vs. union shop) to a nonmandatory subject. *Nordstrom, Inc.,* 229 NLRB 601 (1977); *Good GMC, Inc.,* 267 NLRB 583 (1983). Applying these principles to the instant case, I conclude that Pleasantview was legally entitled to insist on an open shop as a quid pro quo for collection and remittance of the Union's initiation fees.

Apart From Its Unilateral Wages Increases, Respondent Did Not Fail to Bargain in Good Faith

The General Counsel allegation that Respondent failed to bargain in good faith is also predicated on David Farkas' use of the term "non-negotiable" in relation to the holiday buy back and pension issues, and the drafting changes made by Respondent.

I have found that Farkas did use the term "non-negotiable" in responding to a question from Union Negotiator Scalish. However, I conclude that such an isolated remark does not by itself constitute a violation of the Act, but must be considered in light of Respondent's overall conduct, *Industrial Electric Reels,* 310 NLRB 1069 (1993). Section 8(d) does not require parties to make concessions and not forbid adamant insistence on a bargaining position, *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984). The question is whether a party is lawfully engaging in hard bargaining or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.

Apart from it unilateral wage increase, I conclude Respondent's conduct falls into the category of lawfully hard bargaining. It was determined to give the Union very little in its new contract but was not completely inflexible. I do not find that it was trying to frustrate any agreement.

It is in this vein that I also approach the language changes appearing in Respondent's September proposals. It certainly would have been preferable if Margaret Kennedy had consulted with Union Negotiator Scalish before making any changes that might have any substantive significance. However, the changes she made involved issues other than those that were central to the parties' negotiations. Indeed, some of the changes mentioned in the General Counsel and Union's briefs appear almost trivial. I find that Margaret Kennedy was not trying to frustrate an agreement and that if negotiations had not broken down over more important concerns the Union's objections to her drafting changes most likely would have been resolved.

Respondent Was Not Entitled to Implement Its Final Offer on September 22, Because the Parties Had Not Reach a Lawful Impasse

I have absolved Pleasantview of many, if not most of the allegations that form the General Counsel's assertion of bad-faith bargaining. Nevertheless, I conclude that Respondent's unilateral wage increases seriously hindered the negotiating process and therefore a lawful impasse was not reached in September. *La Porte Transit,* 286 NLRB 132 (1987), enfd. 888 F.2d 1182 (5th Cir. 1989); *Circuit-Wise, Inc.,* 309 NLRB 905, 918–920 (1992); and *White Oak Coal Co.,* 295 NLRB 567 (1989). Therefore, Respondent violated Section 8(a)(1) and (5) by implementing its final offer.

By unilaterally raising its wage rates in July, Respondent achieved most of what it hoped to achieve in bargaining. Afterwards, it had little reason to compromise with the Union or to seriously bargain over those issues that the Union deemed important. It is conceivable that in the absence of the unilateral wage increase, the parties may have reached an overall agreement. Therefore, I conclude that no valid impasse was reached which would allow Pleasantview to lawfully implement it final offer. *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1967).

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[3] The only written memorialization of this understanding is an unsigned July 15, 1985 letter from Margaret Kennedy to Scalish stating the payment of initiation fees was inoperative "for the period of this contract." (Exh. R–5.)

[4] Neither the General Counsel nor the Union argue that Respondent violated the Act after the expiration of the 1993–1996 contract on May 31. Nevertheless, an employer must comply with the terms of a collective-bargaining agreement after it expires, until such time as it has bargained to impasse, or the union has waived its right to bargain. *Beitler-McKee Optical Co.,* 287 NLRB 1311 (1988).

Finally, Respondent contends that it was entitled to implement its final offer because the Union has lost its majority status. I conclude otherwise because the disaffection of employees from the Union cannot be separated from Respondent's unilateral wage increases and the resulting lack of progress in negotiations. *Abby Medical/Abby Rents, Inc.,* 264 NLRB 969 (1982); *Cutten Supermarket,* 220 NLRB 507, 508 (1975); and *Lee Lumber & Building Material Corp.,* 322 NLRB 175, 176–177 (1996).

CONCLUSIONS OF LAW

1. By unilaterally raising its employees wages during collective-bargaining negotiations, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By refusing to collect and remit employees' unpaid union initiation fees in accordance with the terms of its 1993–1996 collective-bargaining agreement, Respondent violated Section 8(a)(1) and (5).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. It appears that in implementing its final offer, Respondent ceased making contributions to the Union's pension fund and decreased the number of paid holidays for employees. Therefore, I will order Respondent to make employees whole for any losses that resulted from the implementation of its offer.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Pleasantview Nursing Home, Inc., Parma, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate bargaining unit set forth below, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All nurses aides, orderlies, housekeeping aides, laundry aides, cooks, dietary aides, activity aides, physical therapy aides and the assistant director of activities at Respondent's 7377 Ridge Road, Parma, Ohio facility, but excluding volunteers in the activities department, part-time employees working twenty-four hours a week or less, high school students or nursing students from accredited nursing schools working during the summer months, office clerical employees, guards and supervisors, as defined by the Act.

(b) Making unilateral changes in wages, rates of pay, or other terms and conditions of employment of its employees in the above-described appropriate unit during contract negotiations.

(c) Refusing to collect and remit union initiation fees as required in the 1993–1996 collective-bargaining agreement between Respondent and the Union.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the above-named labor organization, rescind any changes in wages, rates of pay, or other changes in unit employees' terms and conditions of employment which it unilaterally instituted.

(b) Make whole all employees for losses sustained as a result of Respondent's unilateral actions, together with interest. Interest shall be computed as in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

(c) Collect and remit to the Union any employee's unpaid initiation fees that Respondent was required, after March 17, 1996, to collect and remit pursuant to the written terms of the 1993–1996 collective-bargaining agreement.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its nursing home in Parma, Ohio, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 17, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(g) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."